FILED
02-12-2024
CIRCUIT COURT
DANE COUNTY, WI
2022CF002481

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No: 2022-CF-2481

MARK WAGNER,

Defendant.

RESPONSE TO STATE'S MOTION FOR A DAUBERT HEARING

The Defense has retained two experts in this case, Emanuel Kapelsohn and Robert Willis. Both are expected to offer testimony on vehicle containment; firearms training and ballistics; police officers' use of force in tactical situations and self-defense scenarios; and video enhancement. (Docket 67). The State's motion for a *Daubert* hearing challenges the admissibility of their expected testimony. (Docket 79).

While it is undisputed both Kapelsohn and Willis have been accepted by courts in Dane County, other counties throughout the State, and throughout the United States on the topics proffered by the Defense, the State challenges the proffered testimony on "relevancy" and "supplanting the jury" arguments. Both of those arguments are unpersuasive. Consistent with acceptable expert testimony in criminal matters, the primary purpose of their testimony is to assist and educate the jury in areas of which they are unfamiliar that relate to the particular facts at issue and the evidence of, or lack thereof, of the charged offense and self-defense. Therefore, utilizing the *Daubert* factors

as codified in Wis Stat. § 907.02(1), the Court should deny the State's motion for the reasons set forth below.

I. ANTICIPATED TESTIMONY OF EXPERTS

A. Emanuel Kapelsohn

Based on a review of the police reports, witness interviews, photographs, videos, physical observation of the scene, and physical observation of much of the evidence collected by the State, Kapelsohn is expected to testify about the matters discussed in his reports that were previously provided to the State.

Through his review of the evidence, his training and experience, Kapelsohn will demonstrate that a black semi-automatic pistol, viewed from the front (muzzle end) when it is being pointed at an individual, is very similar to the appearance of a black cell phone when the end of it is seen or pointed at another person.

Kapelsohn will also demonstrate common movements which are consistent with an individual drawing, or attempting to draw, and point a weapon at another person. These movements are taught to and known by police officers and defined as justifiable "furtive movements." Kapelsohn's testimony will assist the jury on the use of handguns and movements consistent with the drawing of a handgun and/or handling of a firearm.

Kapelsohn will also testify consistent with numerous studies and scholarly articles about a police officer's ability or lack of ability to know how many shots have been fired. His testimony will be based not only on his own personal experience on the subject matter, but also on his forty (40) years of expert witness work and forty-five (45) years as a law enforcement firearms trainer.

Kapelsohn will also testify based on his experience of listening to the sounds of gunshots for sixty-five (65) years. He has heard hundreds of thousands, if not millions, of gunshots, both with and without ear protection, from all different weapons with various caliber variations. He can testify as an expert, as he has done many times, as to shots at various distances, inside buildings, cars, holsters, underneath clothing, and the numerous times people have misheard the sound of a gunshot.

Kapelsohn will also testify that auditory exclusion (or occlusion) has been the subject of many studies and is widely accepted and taught throughout the United States (and the world) in local, state, and federal police academies and training programs. In fact, he has taught this subject for many years, both at the academy and university level, and has personal experience of it himself.

In addition to the testimony discussed above, Kapelsohn is expected to testify to what he observed on the ballistic shield, the Halligan tool, and the vehicle; that he himself looked through the window of the shield and also inspected the dark broken window tint from the car, neither of which the jury will have an opportunity to do.

Specifically, regarding Wagner's actions relevant to this case, Kapelsohn will testify that his actions were consistent with law enforcement training and accepted law enforcement standards. This testimony is based on Kapelsohn's expert knowledge of various police tactics and why one would or would not use the same. Such testimony is essential to assist the jury in understanding law enforcement training and accepted standards necessary to render a decision in this matter.

Additionally, Kapelsohn will testify that the principle of "action vs. reaction" has been taught at most police academies throughout the U.S. for decades. In fact, Kapelsohn himself has taught the principle for years at various academies and training programs across the country, has demonstrated it in numerous classes and presentations, and has also demonstrated it in courtrooms during trials. It is an essential part of his instruction as a firearms and tactics instructor. The principle has also been widely accepted, mentioned, and explained in many scholarly articles and books.

Kapelsohn will also testify about shooting scene reconstruction. Despite the State's argument that Kapelsohn's certificate in shooting scene reconstruction was issued by a "police department in Oregon," it was, in fact, issued by Mike Haag and his company, Forensic Science Consultants. He was awarded the certificate following a weeklong course hosted by the Eugene Police Department in Oregon. Mike Haag and his father, Luke Haag, are recognized authorities on shooting scene reconstruction and co-authored the leading textbook on that subject. Even prior to receiving his certificate, Kapelsohn testified about shooting scene construction for many years. Stated otherwise, his knowledge of shooting scene reconstruction is based not only on the course specifically, but on forty-five (45) years as a professional firearms instructor and forty (40) years as an expert witness. He has done reconstructions and partial reconstructions of many shootings and has testified on this subject many times in court cases.

Throughout his career, Kapelsohn has inspected tens of thousands of projectiles and projectile fragments, done considerable test-firing of projectiles of all sorts through glass and other media, into ballistic gelatin, into animal tissue, and other media. He has

testified on these issues in similar cases for many years. At trial, he intends to comment on the nature of the projectile fragments he inspected, the propensity of Wagner's handgun ammunition to fragment or not to fragment, and the projectile entry and exit points located on the vehicle at the scene. Kapelsohn will also comment on the fact that he was unable to view the vehicle involved in the incident in its original form and that the State has altered physical evidence in this case.

Finally, since the early 1990's, Kapelsohn has studied, written about, taught, and testified in court cases about involuntary muscular contraction. It is a widely accepted occurrence and is part of what any firearms instructor or trainer must understand and teach. He has given opinions on this occurrence based on his experience in working on hundreds of cases over the past thirty-nine (39) years and can hardly be considered "junk science."

B. Robert Willis

The Defense proffers that, based on a review of the police reports, witness interviews, photographs, and videos, Willis will testify consistent with the opinions discussed in his report that was previously provided to the State.

Willis will testify that he used a software program to enhance and magnify the video of the incident by 100%, 200%, 400%, 800%, and 1600%. He then viewed the enhanced video frame by frame, which included 32 frames per second, to fully analyze the incident. He will testify about what he saw in the enhanced video frames and how those observations relate to law enforcement tactical operations.

Willis will also testify about the tools and equipment used in law enforcement tactical operations; the "subject in custody" (SIC) maneuver; and the defensive maneuvers used by officers during tactical operations, subjects on which he has trained law enforcement officers for years.

In addition, Willis will testify regarding the general principles of deadly force and how they apply to confrontation with an alleged armed wanted person. He will also testify about the principles of de-escalation and how those principles might be applicable to the facts of this case.

Willis will testify about the relative actions and positions of Wagner, the other officers involved, and the victim and how that might influence the danger posed. And finally, Willis will testify about the factors that can determine the reasonableness of Wagner's actions, given the threat he faced, and how the jury can decide if the force he used was justifiable.

C. Testimony For Which Neither Expert is Anticipated to Testify.

Contrary to the State's assertions, neither expert will testify about what Wagner saw, heard, or felt during the incident. Similarly, they will not testify as to why Wagner can or cannot recall events prior to or during the event. Likewise, they will not testify about what Wagner thought, believed, or understood – that is for Wagner to do.

Regarding the officers on the scene, neither expert will testify about their understanding of the incident but can comment on what can be seen and heard by viewing the videos and file. Neither expert will testify about force science doctrine.

Regarding the victim, neither expert will testify as to whether he created the danger to himself. Importantly, neither expert will testify whether anyone "is telling the truth." Such a determination is for the jury to make. Both experts simply seek to educate the jury on these matters regarding the characteristics of officer-involved shootings.

II. § 907.02(1) Requirements

Wisconsin Statute § 907.02(1) governs the testimony by experts:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Section 907.02(1) requires the Court to act as a gatekeeper and make several determinations before admitting expert testimony:

1. Whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
2. Whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
3. Whether the testimony is based on sufficient facts or data;
4. Whether the testimony is the product of reliable principles and methods; and
5. whether the witness has applied the principles and methods reliably to the facts of the case.

State v. Jones, 2018 WI 44, ¶8, 381 Wis. 2d 284, 911 N.W. 2d 97.

Personal knowledge and experience may form the basis for expert testimony. *State v. Hogan*, 397 Wis. 2d 171, ¶25 (2012). In certain fields, experience is the predominant, if

not sole, basis for a great deal of reliable expert testimony. *Id*. To assess reliability in this context, the witness must explain how the experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *Id*. § 907.02(1) requires the trial court to determine, by a preponderance of the evidence and according to whichever criteria it deems appropriate. *Id*., ¶ 26.

III. Both Of The Defense Experts' Testimony Will Assist The Jurors To Understand The Evidence And To Determine A Fact At Issue.

Wagner has been charged by the State with Second Degree Recklessly Endangering Safety, alleging that on or about February 3, 2022, he did recklessly endanger the safety of QLW, in violation of Wis. Stat § 941.30(2). (Docket. 37). It is anticipated that self-defense and the defense of others will be an issue in the trial of this matter. Both the self-defense/defense of others and charged offense jury instructions require findings of both subjective and objective reasonability.

The self-defense/defense of others jury instruction requires that "the defendant's beliefs were reasonable." *WI JI-Criminal 801*. "Reasonably believes" means that the actor believes that a certain fact situation exists and **such belief under the circumstances is reasonable** even though erroneous. *Wis Stat § 939.22(32)*. The phrase in WI JI-Criminal 801, "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. *Maichle v. Jonovic*, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975). For example, with children (assuming they are old enough to be criminally

charged), the standard relates to a reasonable person of like age, intelligence, and experience. *Id*. Whether a defendant's belief was reasonable depends, in part, upon the parties' personal characteristics and histories and whether events were continuous. *State v. Jones*, 147 Wis. 2d 806, 816, 434 N.W.2d 380 (1989).

In addition to the objective reasonableness requirement of self-defense, the State must prove beyond a reasonable doubt that Wagner engaged in criminally reckless conduct. *WI JI-Criminal 1347.* "Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

Id. "Criminal recklessness" is also defined in Wis. Stat. § 939.24(1) as that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk. The Judicial Council Note to § 939.24, 1987, Senate Bill 191, explains that "[r]ecklessness requires both the creation of an **objectively unreasonable** and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

Both experts can assist with their vast knowledge, skill, experience, training, and education in assisting the jury in answering whether Wagner's actions were objectively reasonable. The State complains that both experts' proffered testimony goes into the "ultimate issue of fact in this case for the jury to decide." Wisconsin law permits just that sort of expert testimony: "Testimony in the form of an opinion or inference otherwise

admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Wis. Stat. § 907.04*. Accordingly, each expert should be permitted to testify as to his opinion that Wagner's use of force was reasonable under all the circumstances. The experts' proffered testimony will not invade the province of the jury. The jury free to accept or reject any testimony, including the testimony of an expert, as this Court will no doubt instruct the jury with WI JI-Criminal 200 ("Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion."). Because these experts are not testifying about the credibility of witnesses, their testimony would not invade the jury's province.

The Defense will not ask either expert to testify about what Wagner may have believed at the time of the incident, or whether Wagner was or is telling the truth about it. The State seems to think the Defense will do so and complains that would be the vouching testimony for Wagner, and inadmissible under *State v. Hastline*, 120 Wis. 2d 92 (Ct. App. 1984). However, the experts should be permitted to explain to the jury the basis of their opinions, including the objective reasonableness of Mark Wagner's explanation of why he decided to employ potentially deadly force during the incident. It would be absurd to ask an expert what was going on in Wagner's head at the time of the incident and the Defense would not attempt it. But it is squarely within the purview of an expert to explain to a jury how an average, or reasonable person, and/or police officer, would likely view the same circumstances that Wagner encountered, and opine about whether Wagner's reaction was reasonable.

It is likely that no one on the jury has any life experience in a similar police tactical situation to the one Wagner was in when he fired his pistol. Both experts have extensively studied and trained use-of-force situations, including likely reactions a person may have when facing an assault. Their expertise will help the jury understand the factors involved in a police officer's decision-making in a use-of-force scenario, especially dangerous police tactical scenarios. The subjects about which the experts have proffered are clearly, inarguably "relevant" to the determination of this case. It is obvious that their vast knowledge, training, and experience in these subjects are beyond the ken of the average juror.

IV. Both Defense Experts Are Qualified As Experts By Knowledge, Skill, Experience, Training, Or Education.

Both Kapelsohn and Willis have forty (40) years' experience in teaching self-defense to civilians, self-defense to new police recruits, in-service officers, and police instructors, firearms training, and police tactics for many police departments and police academies throughout the United States. They both bring a wealth of information to this case that is needed by the defense. There is no question that both experts are qualified, despite the State's contention to the contrary. Each experts' Curriculum Vitae was provided to the State when the Defense filed its Notice of Experts on November 6, 2023. (Docket. 67). *See Docket No. 63 and 64.*

The State lists cases in which Courts have limited the subjects on which Kapelsohn could testify without explaining the details of what he was able to testify about in the case. Each case had its issues and limiting testimony to the issue at hand does not

necessarily mean that he was not qualified to testify, but that the court limited the testimony to the issue being tried. Likewise, the opposing party's expert was also limited to the same areas.

Willis has substantial experience teaching police officer use of force and self-defense, working with numerous police department groups as well as private citizens. He has testified on numerous occasions as an expert in cases involving private citizens as well as an officer's right of self-defense. Those cases include Dane County cases *State v. Gadson*, 18CF2240 and *State v. Lucas*, 09CF993. He was also qualified as an expert in the self-defense cases *State v. Jess Corsello*, Washburn County Case No. 10CF64 and *State v. Kramer*, Milwaukee County Case No. 16CF5003.

V. Both Defense Experts' Testimonies Are Based On Sufficient Facts Or Data.

The testimony of both Kapelsohn and Willis is based on a review of the materials provided by the State, including police reports, witness interviews, photographs, and videos. In addition, both Kapelsohn and Willis have reviewed several witness statements prepared by the Defense. In the case of Kapelsohn, he also made a physical observation of the incident scene and much of the evidence collected by the State, including firearms, ammunition, casing, fragments, ballistic shield, Halligan tool, and a vehicle. He also conducted several tests on firearms, ammunition, and a vehicle like the ones involved in the incident. In the case of Willis, he also enhanced, magnified, and slowed down the principal video of the incident. *See also Wis. Stat. §§ 907.03 – Bases of opinion of testimony of experts, and 907.05 – Disclosure of facts or data underlying expert opinion.*

VI. Both Defense Experts' testimonies Are The Product Of Reliable Principles And Methods.

Personal knowledge and experience may form the basis for expert testimony. *Seifert v. Balink*, 372 Wis 2d 525, ¶77 (2017). In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *Id*. Both Defense Experts' principles and methods are based on their respective decades of personal experience and knowledge as police officers, law enforcement trainers, and continuing education regarding their proffered testimony. They have used this experience and knowledge to train and testify all over Wisconsin and the United States. They applied this experience and knowledge to the facts and data they reviewed concerning this matter and are prepared to offer their respective opinions on what occurred and didn't occur on February 3, 2022.

VII. Both Defense Experts Have Applied The Principles And Methods Reliably To The Facts Of The Case

Both Defense Experts have indisputably provided a thorough overview of their respective experiences and qualifications in their reports, CVs, and this brief. Both have also sufficiently detailed how their training and experience led to their analysis of the facts and their conclusions to date. Nothing in § 907.02 or case law mandates the necessity of an expert's explaining precisely which portions of his or her background generated each individual conclusion. *Hogan*, 397 Wis. 2d 171, ¶ 34 (2012).

VIII. Conclusion

For the reasons stated above, the Court should deny the State's *Daubert* motion. Both Defense Experts will opine about the matters that the Defense has proffered in its

expert disclosures, their respective reports, and this brief. Their testimony will undoubtedly assist the jurors in analyzing the evidence and determining facts at issue in this case that are vitally important to the Defense. They are both eminently qualified and have used their knowledge and experience to review the facts of this case. Therefore, their proposed testimony is permissible under Wis. Stat. § 907.02.

For the Court's consideration, should it require either expert to be available for purposes of this motion, the Defense requests they be permitted to appear via Zoom, as travel, especially for Kapelsohn, would be extremely expensive.

Dated at Milwaukee, Wisconsin, this 12th day of February 2024.

Respectfully submitted,
TERSCHAN, STEINLE, HODAN & GANZER, LTD.

Electronically Signed By:

MICHAEL J. STEINLE
Attorney for Mark Wagner
State Bar No. 1018859

P.O. Address
309 North Water Street, Suite 215
Milwaukee, WI 53202

HART & POWELL SC

Electronically Signed By:

DANIEL H. SANDERS
Attorney for Mark Wagner
State Bar No. 1092309

P.O. ADDRESS:
735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202